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Supreme Court of the United States

OCTOBER TERM, 1934.

No. 538

HARRY SEMLER,

Appellant,

vs.

OREGON STATE BOARD OF DENTAL EXAMINERS, L. A. ROSENTHAL, LEONARD R. ANDREWS, CARRIE H. JENKINS, ARTHUR F. WEEKS and M. C. HARRIS, MEMBERS OF THE STATE BOARD OF DENTAL EXAMINERS.

Appellees.

OPINION BELOW.

The opinion of the Supreme Court of the State of Oregon is found in case 2541, Oregon Advance Sheets, Volume 18, page 1223, decided June 26, 1934, and reported in 34 Pac. (2d) 311.

JURISDICTION.

In compliance with rule 12, appellant submitted his statement showing the basis of this court's jurisdiction in this cause. On December 10th, 1934, this court entered an order providing that further consideration of the question of jurisdiction be postponed to a hearing on the merits. Argument upon this question is submitted herein, pages 38 to 45, inclusive.

QUESTIONS PRESENTED

The question presented is whether or not the legislative enactment of the State of Oregon prohibiting a dentist from advertising regarding professional superiority or professional service in a superior way, advertising prices for professional services, advertising by means of large display and employing solicitors and publicity agents, guaranteeing dental work or guaranteeing dental operations painlessly, and permitting the dental board to bring the charges and hear them, contravenes the Constitution of the United States, and whether the enactment is in contravention of the due process of law provision, whether it impairs the obligations of contracts and whether it unreasonably abridges the privileges and immunities of citizens of the United States, and whether the law attempts to impose unreasonable and unlawful restrictions upon the exercise of the plaintiff's profession of dentistry, and whether it is a proper exercise of police powers of the state.

STATUTES INVOLVED.

Oregon Laws, Special and Regular Session, 1933, Chapter 166, page 208.

STATEMENT OF FACTS

Harry Semler, the plaintiff-appellant, is a practicing dentist in the City of Portland, Oregon, and duly licensed under the laws of the State of Oregon.

In 1913 the Legislature of the State of Oregon passed the dentist qualification law, which act is found in Sections 68-1001 to 68-1009 inclusive, Oregon Code Annotated, 1930 Edition. Section 68-1013 provided that the license of a practicing dentist might be revoked upon the following ground:

First, conviction of a felony or misdemeanor involving moral turpitude.

Second, for renting or loaning to any person his or her license or diploma to be used as a license or diploma by such person.

Third, "For unprofessional conduct, or for gross ignorance or inefficiency in his profession. Unprofessional conduct shall mean employing what are known as 'cappers' or 'steerers' to obtain business; the obtaining of any fee by fraud or misrepresentation; wilfully betraying professional secrets; employing directly or indirectly any student or any suspended or unlicensed dentist to perform operations of any kind, or to treat lesions of the human teeth or jaws, or correct malimposed formations thereof; the advertisement of dental business or treatment or devices in which untruthful or misleading, improbable or impossible statements are made; or habitual intemperance or gross immorality."

In 1933 the Legislature of the State of Oregon amended this act. The amendment is found in Oregon Laws, Special and Regular Session, 1933, Chapter 166, page 208, in which amendment the causes for revoking a dentist's license are greatly enlarged, and a number of causes are enumerated as sufficient for revoking one's license not provided for in the original act. Additional causes for revoking the license are as follows:

"advertising professional superiority or the performance of professional services in a superior manner; advertising prices for professional service; advertising by means of large display, glaring light signs, or containing as a part thereof the representation of a tooth, teeth, bridge work or any portion of the human head; employing or making use of advertising solicitors or free publicity press agents; or advertising any free dental work or free examination; or advertising to guarantee any dental service, or to perform any dental operation painlessly."

The amendment of 1933 added the following definitions of unprofessional conduct:

1. Advertising professional superiority or the performance of professional services in a superior manner.
2. Advertising prices for professional services.
3. Advertising by means of large display, glaring light signs or containing as part thereof the representation of a tooth, teeth, bridge work or any portion of the human head.
4. Employing or making use of advertising solicitors or free publicity agents.
5. Advertising to guarantee any dental work.
6. Advertising to guarantee any dental operation painlessly.

It will be noticed that these new prohibitions merely condemn the *advertising* of certain acts. For instance, the act does not condemn a dentist guaranteeing that he will make his work good if it should result disastrously, nor does it deny the dentist a right to make free examinations or bestow free dental work upon people who are not able to pay, but it does deny him the right to advertise such facts. The wrongdoing on the part of the dentist consists

in his advertising and not in performing the acts themselves.

The plaintiff-appellant filed a complaint in the Circuit Court of the State of Oregon for the County of Multnomah in which complaint he set up and alleged that on the 6th day of June, 1918, he was duly admitted to practice dentistry in the State of Oregon and that a license was granted to him and that the license was in full force and effect at the time the act in question was passed. He further alleges that ever since said time he has been practicing his profession in Portland, Oregon. He alleges that prior to the act in question passed by the Legislature in 1933 there was in existence the former act passed by the Legislature in 1913, which provided for revocation of license under certain conditions and circumstances. He alleges that he has always advertised his occupation in the daily newspapers and periodicals and by means of signs in and about the building which he occupies. He alleges that he advertised his professional and occupational skill truthfully and honestly. He alleges that he has during his practice acquired skill and ability to perform his work and that because of his experience and large number of clients he has acquired superior skill or ability in dental work. He further alleges that because of his low prices he is able to render dental services even to the poorest pople and that because of this fact he is rendering a beneficial public service in view of the fact that many people are not able to pay the ordinary dental prices, and because of this fact the plaintiff reaches a class of people who otherwise would be

unable to secure dental services at all. He also alleges that he has contracts with the Oregon Neon Sign Company for an advertising sign in front of the offices he occupies, and that said contract runs for a period of forty-four months from October 1, 1932, at a rental of $50.00 per month, and that the law in question would render said contract of no value to him. He also alleges that he has enforceable contracts with the newspapers in the City of Portland, namely, the Oregonian, Daily Journal and News Telegram, for a definite amount of space for advertising purposes, and that it would become impossible for him to utilize such space if said law was enforced, and that said law impairs the obligation of such contracts. Furthermore he alleges he leased office space in the Alisky Building in Portland, Oregon, under a written lease which still has forty-four months to run, that said space is highly desirable, and includes large quarters, and that said lease would become a detriment and loss to him in case said law was enforced and would impair said lease, in view of the fact that it would deprive plaintiff of much of his business and render said space unnecessary. The plaintiff alleges that the specific portion of said act which plaintiff claims to be unconstitutional and void is the portion reading as follows, to-wit:

> "advertising professional superiority or the performance of professional services in a superior manner; advertising prices for professional service; advertising by means of large display, glaring light sign, or containing as a part thereof the representation of a tooth, teeth, bridge work or any portion of the human head; employing or making use of advertising solicitors or

free publicity press agents; or advertising any free dental work or free examination; or advertising to guarantee any dental service, or to perform any dental operation painlessly."

Plaintiff alleges in his complaint that said act is unconstitutional for the following reasons, to-wit:

(a) The said pretended law attempts to deprive plaintiff of his property "without due process of law and in violation of Section 1, Article 14 of the Amendment to the Constitution of the United States, which provides that no state shall deprive any person of property without due process of law.

(b) The said pretended law attempts to impair the obligations of plaintiff's contracts in violation of Section 10, Article 1 of the Constitution of the United States and of Section 21, Article 1, of the Constitution of the State of Oregon.

(c) The said pretended law attempts to deny to plaintiff the equal protection of the laws in violation of Section 1, Article 14 of the Amendments to the Constitution of the United States, and Section 20, Article 1, of the Constitution of the State of Oregon.

(d). That said pretended law violates the provisions of Section 1, Article 14 of the Amendments of the Constitution of the United States which provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, and Section 20, Article 1 of the Constitution of the State of Oregon.

(e) That the said pretended law attempts to impose unreasonable and unlawful restrictions upon the exercise of the plaintiff's profession of dentistry and thereby affect his property right therein.

The prayer of said complaint seeks to have declared unconstitutional and void the following portion of said act:

> "advertising professional superiority or the performance of professional service in a superior manner; advertising prices for professional service; advertising by means of large display, glaring light sign, or containing as a part thereof the representation of a tooth, teeth, bridge work, or any portion of the human head; employing or making use of advertising solicitors or free publicity press agents; or advertising any free dental work for free examination; or advertising to guarantee any dental service; or to perform any dental operation painlessly."

A general demurrer was filed to said complaint upon the ground that said complaint does not state a cause of suit against the defendants or against any of them; whereupon the trial judge of the Circuit Court for the County of Multnomah, State of Oregon, sustained said demurrer and the plaintiff not pleading further a decree was entered by the trial judge of the Circuit Court of Multnomah County, Oregon, dismissing said complaint without prejudice to plaintiff's rights to appeal from said decree. Thereupon an appeal was had to the Supreme Court of the State of Oregon. After due deliberation the Supreme Court of the State of Oregon affirmed the decree of the Circuit Court in an opinion found in case No. 2541 Oregon Advance Sheets, Volume 18, page 1223, decided June 26, 1934, and reported in 34 Pac. (2d) 311. Thereafter petition for rehearing was filed and after due consideration of said petition it was overruled by the Supreme Court, on the 11th day of September, 1934, and its said judgment became final on said date.

POINTS AND AUTHORITIES.

Said legislative act is unconstitutional and void for the following reasons, to-wit:

(a) The said pretended law attempts to deprive plaintiff of his property without due process of law and in violation of Section 1, Article 14 of the Amendments to the Constitution of the United States, which provides that no state shall deprive any person of property without due process of law.

(b) The said pretended law impairs the obligations of plaintiff's contracts in violation of Section 10, Article 1 of the Constitution of the United States.

(c) That said pretended law violates the provisions of Section 1, Article 14 of the Amendments of the Constitution of the United States which provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.

(d) That the said pretended law atempts to impose unreasonable and unlawful restrictions upon the exercise of the plaintiff's profession of dentistry and thereby affect his property right therein.

Lochner v. *New York*, 198 U. S. 45-53.

Hawker v. *New York*, 170 U. S. 189-194.

Adams v. *Tanner*, 244 U. S. 590-594.

Kalman v. *Walsh*, 355 Ill. 341-347.

State v. *Redmon*, 134 Wis. 89-107.

Laughney v. *Mayberry*, 145 Wash. 146.

Ex Parte Craycroft, 24 Ohio N. P. (N. S.) 513.

Waller v. *State*, 68 S. W. (2d) 601 (Tex), Decided Jan. 29, 1934.

Chenoweth v. *State Board of Medical Examiners*, 57 Colo. 74.

Schireson v. *Walsh*, 354 Ill. 40.

Brown v. *University of the State of New York*, 273 N. Y. S. 809.

Harris v. *State Board of Optometrical Examiners*, 287 Pa. 531, 535.

Sapero v. *State Board of Medical Examiners*, 90 Colo. 568-580.

Berry v. *State*, 135 S. W. 631 (Tex.).

Hewitt v. *State Board of Medical Examiners*, 148 Cal. 590-593.

State Board of Medical Examiners v. *Macy*, 92 Wash. 614-617.

Glass v. *State Board of Medical Examiners*, 50 Cal. App. 389-392.

Aiton v. *Board of Medical Examiners*, 13 Ariz. 354-360.

Ex Parte McNulty, 77 Cal. 164-168, 19 Pac. 237.

State Board of Medical Examiners v. *Jordan*, 92 Wash. 234-239.

Yoshizawa v. *Hewitt*, 52 Fed. (2d) 411.

To allow the dental board to bring charges for matters within its own knowledge and hear them is not due process of law, even though the member of the board who brings the charges is not allowed to hear them.

Abrams v. *Jones*, 35 Idaho 532.

ARGUMENT

The legislative enactment deprived the plaintiff of his property without due process of law.

The Supreme Court of Illinois, in the case of Kalman v. Walsh, 355 Ill. 341-347, used the following language:

> "The right to practice dentistry is a valuable right. It is a property right within the due process of law clause of the Constitution. Revocation of the license of a professional man to practice his chosen profession carries with it not only disgrace and humiliation, but deprives him of his means of earning his livelihood. It is the death of his professional life and there is usually no resurrection after death."

To the same effect see Waller v. State, 68 S. W. (Tex.) 601-605, a decision by the Court of Civil Appeals of Texas, rendered January 29, 1934.

The complaint, which for the purpose of this demurrer must be considered as true, alleges that the plaintiff has been practicing dentistry since the 6th of June, 1918, and as a result of truthful and honest advertising and high-class workmanship he was possessed of a lucrative dental practice; that the number of his patients aggregated approximately one hundred and fifty per day; and that because of said large practice, it had become possible for him to standardize his office management and operations, to purchase supplies and materials in large quantities, and at prices a great deal lower than dentists who are obliged to buy in small quantities; that by reason thereof plaintiff has been able to establish a uniform schedule of prices; that because of his advertising, patients have become acquainted with the fact that plaintiff could perform dental services in accordance with his advertisements; that his

practice, because of its size, had become lucrative, and that because of this act, which forbids advertising, said property rights accumulated through years of industry and effort will be swept away. In addition to the above, it appears from the complaint that the plaintiff has entered into advertising contracts with the daily newspapers of Portland, Oregon, namely, the Oregonian, Oregon Journal and News Telegram, and has also made advertising contracts with other parties, a number of which have considerable time to run, and that this enactment will render said contracts of no value to him.

We are not unmindful of many decisions of this court to the effect that property rights and contractural rights must yield to the police powers of the state and nation, but in order for the enactment to have a basis under the police powers of the state, the regulation must be reasonable and have a tendency to promote the public health and public welfare.

In the case of Lochner v. New York, 198 U. S. 45, this court said, page 53:

> "The statute necessarily interferes with the right of contract between the employer and employes, concerning the number of hours in which the latter may labor in the bakery of the employer. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution. Allgeyer v. Louisiana, 165 U. S. 578. Under that provision no State can deprive any person of life, liberty or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this

amendment, unless there are circumstances which exclude the right. There are, however, certain powers, existing in the sovereignty of each State in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals and general welfare of the public. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the State in the exercise of those powers, and with such conditions the Fourteenth Amendment was not designed to interfere. Mugler v. Kansas, 123 U. S. 623; In re Kemmler, 136 U. S. 436; Crowley v. Christensen, 137 U. S. 86; in re Converse, 137 U. S. 624."

In the instant case the plaintiff sells his services to the public, as does each professional man.

The statute does not render the doing of the acts wrongful, but merely prohibits the plaintiff from advising the public through the usual channels of his ability and his capacity to perform such acts. The acts in themselves are not condemned as wrongful. This enactment not only in effect prohibits the plaintiff from entering into contracts, but in effect it also prohibits the advertising mediums of our country from entering into contracts with dentists. It in effect places its inhibition upon both parties to the contract. As this court stated in the last cited case, liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor.

The primary purpose of legislation of this nature is to qualify the dentist both in character and in learning to perform his duties toward the public, but when the legislation has made his qualifications as to learning and character reasonably certain, there is no more for the police power to effectuate. The enactment in question has no relation to the knowledge or the character of the plaintiff.

In the case of Hawker v. New York, 170 U. S. 189, 194, this court, in speaking of the qualification of a physician, used the following language:

> "It is fitting not merely that he should possess a knowledge of diseases and their remedies, but also that he should be one who may safely be trusted to apply those remedies. Character is as important a qualification as knowledge, and if the legislature may properly require a definite course of instruction, or a certain examination as to learning, it may with equal propriety prescribe what evidence of good character shall be furnished. These propositions have been often affirmed. In Dent v. West Virginia, 129 U. S. 114, 122, it was said in respect to the qualifications of a physician: 'The power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against the consequences of ignorance and incapacity as well as of deception and fraud'."

The legislative enactment of 1913 heretofore referred to amply secures to the public certainty as to the character and general demeanor of the dentist. It provides for revocation of his license for any act which in itself involves moral turpitude or wrongdoing. It provides that

the advertisement of dental business or treatment or devices in which untruthful, misleading, improbable or impossible statements are made, shall be ground for revocation of the license of a dentist. Practically all of the states of the Union have been operating under provisions of a like nature for years. It is only the last few years that enactments similar to the one now in question have found their way into our statute books. What was the purpose, then, of the additional legislation? Was it enacted primarily for the benefit and welfare of the public, or was its purpose rather to create within the profession itself rules and regulations in the interest of certain members of the profession? We take it that this legislation must be considered in the light of the legislation already in existence.

As was said by this court in the case of Adams v. Tanner, 244 U. S. 590-594:

> "Certainly there is no profession, possibly no business, which does not offer peculiar opportunities for reprehensible practices; and as to every one of them, no doubt, some can be found quite ready earnestly to maintain that its suppression would be in the public interest. Skillfully directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the fundamental guaranties of the Constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked.
>
> The general principles by which the validity of the challenged measure must be determined have been expressed many times in our former opinions. It will suffice to quote from a few.

In Allgeyer v. Louisiana, 165 U. S. 578, 589, we held invalid a statute of Louisiana which undertook to prohibit a citizen from contracting outside the State for insurance on his property lying therein because it violated the liberty guaranteed to him by the Fourteenth Amendment. 'The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.'

'If, looking at all the circumstances that attend, or which may ordinarily attend, the pursuit of a particular calling, the State thinks that certain admitted evils cannot be successfully reached unless that calling be actually prohibited, the courts cannot interfere, unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law.' Booth v. Illinois, 184 U. S. 425, 429.

'It is also true that the police power of the State is not unlimited, and is subject to judicial review, and when exerted in an arbitrary or oppressive manner such laws may be annulled as violative of rights protected by the Constitution. While the courts can set aside legislative enactments upon this ground, the principles upon which such interference is warranted are as well settled as is the right of judicial interference itself. The legislature being familiar with local conditions is, primarily, the judge of the necessity of such enactments. The mere fact that a court may

differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power * * * If there existed a condition of affairs concerning which the legislature of the State, exercising its conceded right to enact laws for the protection of the health, safety, or welfare of the people, might pass the law, it must be sustained; if such action was arbitrary interference with the right to contract or carry on business, and having no just relation to the protection of the public within the scope of legislative power, the act must fail'." McLean v. Arkansas, 211 U. S. 539, 547, 548."

The Supreme Court of Wisconsin, in the case of State v. Redmon, 134 Wis. 89-107, used the following language:

"The ostensible purpose of the law, as indicated by its title is to promote the 'health and comfort of occupants of sleeping car berths.' Words were used in such title ex industria, seemingly, to give to the enactment, unmistakably, the character of a police regulation, but a law is not necessarily one to promote the public health and comfort of people generally, or of a legitimate class thereof, merely because such is its declared purpose.

As it is a judicial function to define the proper subjects for the exercise of police power (Town of Lake View v. Rose Hill Cemetery Company, 70 Ill. 191, 22 Am. Rep. 71), it must be to decide, as to any enactment, whether it really relates to a legitimate subject or under the guise of doing so violates rights of persons or property. The idea that all legislation is within the police power which the law-making authority determines to be so, and that all which might be within such power is within it if the Legislature so determines is, as we have seen, a heresy, and one which was

repudiated sufficient for all time by the early decision, heretofore referred to, in Marbury v. Madison, supra, the American classic which first and conclusively defined the general character of the constitutional limitations and the relations of the Legislature and the judiciary thereto and to each other. The doctrine there laid down more than a century ago in the unanswerable logic of Chief Justice Marshall has never been departed from, except accidentally, inconsiderately or ignorantly.

These words of the Supreme Court of the United States, speaking by Mr. Justice Harlan, in Mugler v. Kansas, 123 U. S. 623-661, 8 Sup. Ct. 273, 297, 31 L. Ed. 205, expresses in a different form the spirit of the opinion in Marbury v. Madison, supra: "The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the Legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

In the words of Blackstone, the great commentator, in considering this legislation we have the old law and the mischief, if any, and the remedy. The former legislation we submit was ample to protect the public. It specifically provides for the revocation of licenses in case of moral or professional delinquency. It specifically provides for revocation of licenses in case of misleading or fraudulent advertising. It even goes so far as to permit

revocation in case of improbable or impossible statements in advertisements. A reading of this act we believe will convince one that the old law was amply sufficient to cope with all existing delinquencies on the part of the dental profession. And what is the danger to which this legislation directs attention? It is not because of any lack of knowledge or character on the part of the dentist for the legislation in question does not in any respect tend to elevate or increase the qualifications of the dentist. It adds nothing to the sum total of his knowledge or to his qualifications in regard to character and fair dealing, but it is contended that to allow a dentist to advertise his qualifications or the price which he may charge, or the fact that he will give free examinations or free dental service has a tendency to injure the public welfare and all this in an age when education is almost universal and the further fact that dental services are today the rule and not the exception. The care of teeth is taught in our public schools. The subject of hygiene is now almost as common in our educational system as mathematics. While it is true that the dental profession is one of the learned professions in conjunction with the law or medicine, it is also true that much of the work of a dentist is of a mechanical nature. The extraction of a tooth, the filling of a cavity, the placing of a crown or bridge, is in a large measure mechanical. True, there are many things in connection with the treatment of teeth that lie in the realm of dental science with which the layman is not familiar, but we submit that the dental profession is hardly to be classed in its confidential relation with the position of physician and

patient and lawyer and client, and when we come to analyze the remedy proposed by this legislation, in considering the mischief, does a danger actually exist? Is it of sufficient magnitude? Does it concern the public? Does the purported measure tend to remove it and is the restraint or requirement in proportion to the danger? These are the questions which, in the words of the Wisconsin Court, must be considered in determining whether there is a real mischief that needs remedying.

Adverting to the legislation in question, there are six prohibitions, as follows:

1. Advertising professional superiority or the performance of professional services in a superior manner.
2. Advertising prices for professional services.
3. Advertising by means of large display, glaring light signs or containing as part thereof the representation of a tooth, teeth, bridge work or any portion of the human head.
4. Employing or making use of advertising solicitors or free publicity agents.
5. Advertising to guarantee any dental work.
6. Advertising to guarantee any dental operation painlessly.

Analyzing these various prohibitions, is there any serious danger to the public in any of these activities?

Adverting to Number 1, advertising professional superiority or the performance of professional services in a superior manner. Is there anything inherently dangerous to the public? We do know that in each profession

some stand out superior to others. In each profession we have men advertising their superiority. In the dental profession it is not wrong to specialize in extraction work exclusively or dental x-ray work exclusively, and ordinarily when a person desires teeth extracted he invariably goes to an extraction specialist and not to the general practitioner. In the medical profession we have the eye, ear, nose and throat specialist, we have the goitre specialist, and the tuberculosis specialist, all of whom advertise professional superiority. This is the day of the specialist. It is so in the law and it is so in the medical and dental profession. The specialist in criminal law is not called upon to handle corporation litigation, nor vice versa, and a man in the law profession who constantly practices personal injury litigation against defendants is not called upon in other lines of activity. To say that these men who specialize along these special lines cannot advertise their superiority is to take from the public information which the public has a right to know. It would prohibit the medical man from specializing in any subject and then advertising that through special work and years of endeavor along special lines he had fitted himself a little more competently than his brethren in a general practice. We submit that it is to the interest of the public to know who are specialists, to know their superiority along certain lines. It certainly cannot be claimed that such information is to the detriment of the public. If a dentist advertises professional superiority misleadingly or deceitfully, the statute in effect prior to the present enactment is amply sufficient to take care of such advertising,

but when a dentist advertises truthfully and honestly he feels himself more competent to engage along a special line and so advises the public through the regular channels, wherein is there any impairment of the general welfare of the public?

Adverting to the second prohibition, namely, advertising prices for professional services. Is this contrary to the general welfare if honestly and truthfully done? Many are the cases in our law books where the public has resisted payment of charges on the ground of excessiveness and we dare say in many cases the layman has been successful. Is it not in the interest of fair play and general welfare that a patient of a dentist should know what his charges are to be and not leave it to speculation, contention or litigation afterwards? The extraction of a tooth is pretty much the same in the various individuals. Certainly there can be no impairment of the general welfare in advertising the price of extraction or the price of a gold crown or the price of a lower or upper plate. There is no more impairment of the general welfare in advertising such prices as it is for the merchant to advertise the prices of his wares in the daily press.

Adverting to number 3, advertising by means of large display, glaring light signs or containing as part thereof the representation of a tooth, teeth, bridge work or any portion of the human head, what is meant by large display or glaring light signs is left to speculation and conjecture. Certainly the representation of a tooth, teeth,

bridge work or any portion of the human head in no way injures the public health or the general welfare of the public.

Fourth, employing or making use of advertising solicitors or free publicity agents, the former law prohibited the use of "cappers" or "steerers" to obtain business.

Fifth, advertising to guarantee any dental work. It is to be noted that when the patient comes into the office the dentist has the right to guarantee that he will make good any defective work, but this law makes it unlawful for the dentist to advertise such fact through the ordinary channels. There is no law which prohibits either a doctor or dentist from guaranteeing his work. The great majority of our personal injury litigation is retained on a contingent basis. The dentist informs the patient that if the crown or bridge is not satisfactory he will replace it with one that is, and is not this in the interests of the public? It stabilizes the price which a patient must pay to the dentist and insures to the patient a satisfactory result. If anything can be said about it, it must be said that it is in the interest of the public and to the detriment of the particular dentist who gives the guarantee.

And lastly we come to number 6, advertising to guarantee any dental operation painlessly. In this day of anesthetics, local and general, dental work has become in a large measure painless. Cannot a dentist advertise that through the use of anesthetics, all of which now are in general use, the extraction of teeth has become practically

painless? Not only so, but the public cannot possibly be misled or the general welfare of the public impaired by advertisement that the extraction of teeth or the doing of dental work is painless. The public knows to what extent dental work subjects the patient to pain. In many of the states of the Union we have free dental work for the school child. We have it in the State of Oregon. In each grade school of the city of Portland we have a special nurse who examines the teeth of the children, makes her findings and report, and these children receive free dental service if desired. We submit that under the present day of social service and the performance of dental work in practically every home, such advertising has no tendency to disparage the public welfare.

Finally we would like to call attention to a few of the cases directly in point. This legislation, having sprung up the last few years, has been enacted in some six or seven states of the Union. Statutes are not altogether the same but they are akin in terminology.

The legislature of the State of Washington enacted a law prohibiting osteopaths from advertising. The act was held constitutional by the Supreme Court of Washington in the case of Laughney v. Maybury, 145 Wash. 146. An opposite view we believe has been taken in the following states:

Ohio: *Ex parte Craycroft*, 24 Ohio N. P. (N. S.) 513,
Texas: *Waller* v. *State*, 68 S. W. (2d) 601. Decided Jan. 29, 1934.

Colorado: *Chenoweth* v. *State Board of Medical Examiners*, 57 Colo. 74.

Illinois: *Kalman* v. *Walsh*, 355 Ill. 341-347.

See also *Schireson* v. *Walsh*, 354 Ill. 40, 187 N. E. 921.

In the State of New York, the legislature delegated to the trustees of the University of the State of New York the right to make rules and regulations in regard to the practice of dentistry. The trustees passed a regulation prohibiting advertising. The court of New York in the case of Brown v. University of the State of New York, 273 N. Y. S. 809, held that the trustees had no authority to pass a regulation prohibiting advertising. It is to be borne in mind that this decision did not pass upon the question as to whether or not the legislature had the authority to prohibit advertising.

We cite the following cases in point:

Legislation which denies the right to truthfully and honestly advertise as a means of securing patronage by professional men has been condemned as unconstitutional in the following cases:

In Chenoweth v. State Board, 57 Colo. 74, the court held:

> "In the statute under consideration, the mere publication of the advertisement, regardless of its tendency, is sufficient to authorize the revocation of the license, and it must be presumed that the action of the board was based solely upon the fact of the publication, as it was authorized to do by the language of the statute.

Under this statute, then, no matter how harmless or innocent may be the publication, nor what may be the chasteness of its language, nor the utter absence of any tendency to injure the morals of the public, yet the very fact of the publication of the advertisement is sufficient to take from a physician his license and the right to practice his profession. If this is to be justified under the statute, then the very basis upon which rest such statutes of regulation must be ignored. For such legislation is justified only upon the ground of police power and as tending to promote the public health, morals, safety, or general welfare.

* * *

"Advertisements by physicians may be regarded by certain members of the profession, as contrary to professional ethics, but with that Legislatures and courts may not be concerned. The Legislature has no power to confer the authority upon a Board of Medical Examiners to deny to a physician the right to advertise his business.

* * *

"The statute does not provide that a tendency to injuriously affect the public morals or welfare shall appear as an essential fact to be considered in connection with such an advertisement. Neither does the complaint so charge. All of this tends to convey the impression that the purpose of the provision under consideration was to enforce the ethical notions of some members of a profession rather than for the protection of the public at large.

* * *

"For these reasons we must conclude that the provisions of the statute that a physician's license may be revoked for 'causing the publication and circulation of an advertisement relative to any disease of the sexual organs' is in violation of the Fourteenth Amendment to the Constitution and Section 3, Art. 2, of our own Bill of Rights."

In the case of Ex Parte Robert C. Craycroft, 24 Ohio N. P. (N. S.) 513, the Ohio Court uses the following language:

"The profession of dentistry, like any other profession, is supposed to consist only of reputable men. The fact that every profession, whether it be law, medicine, theology, or dentistry, has among its members men who do not reach the standard of high moral qualifications demanded today by society, does not presume that these particular practitioners are disreputable or guilty of gross immoral conduct until they are proven to be such; * * *

"The public is in no way harmed by this class of advertisement, and why the law should place such strictures upon the profession of dentistry can not be explained, except that there is a class of dentists who advertise and a class who do not, just as there are druggists who cut their goods below market price, while others sell at the market price. Such a limitation upon the exercise of their rights is an unreasonable and arbitrary restriction upon a legitimate profession, and is a provision of the law which in no way operates to the benefit of the public health, safety or morals, and is certainly an abuse of legislative power.

"Such legislation is justified only upon the ground of police power and as tending to promote the public health, morals, safety or general welfare. Laws which impose penalties on persons and interfere with the personal liberty of the citizens can not be constitutionally enacted unless the public health, comfort, safety or welfare demands their enactment. It is for the Legislature to determine when an exigency exists for the exercise of this power, but it is for the courts to decide whether or not this power is properly exercised. The Legislature has no power, under the guise of police regulations, to arbitrarily invade the personal rights and liberty of the individual citizen. When the police power is invoked for the purpose of regulating

a useful business, occupation or profession, and the mode in which that business is carried on or is advertised, the Legislature is not the exclusive judge as to what is a reasonable and just restraint upon the constitutional right of the citizen to pursue his calling and to exercise his own judgment as to the manner of conducting it. The general right of every person to pursue any calling and to do so in his own way, provided he does not encroach upon the rights of others, or trespass upon public morals, can not be taken away from him by legislative enactment.

* * *

"Advertisements by dentists may be regarded by certain members of the dental profession as contrary to professional ethics, but the Legislature and courts are not concerned with this view of the case. The Legislature has no power to confer the authority upon a board of dental examiners to deny to a dentist the right to advertise his business, and that is what the Legislature virtually has assumed to do when it enacted the aforementioned Sections 1325 and 1329-1."

In the case of Harris v. State Board of Optometrical Examiners, 287 Pa. 531, 535, we have a statute regulating the practice of optometry. The legislative purpose set forth in the statute was to guarantee the safety of the citizens and protect them from the hands of incompetent persons. The court says:

"Therefore, the manner, scope and extent of the practice are the subjects of legislative inquiry and control; but the regulations must be reasonable. The legislature under the police power does not possess the power to enact rules which have no substantial relation to the end to be attained. It cannot unreasonably prevent or limit the practitione. from acquiring the business for which he was licensed. Legislatures

do not have the power, under the guise of police regulation, to arbitrarily invade the personal right and liberty of the individual. Its determination of the extent of its power is not final or conclusive: White's App., 287 Pa. 259. If it pass an act, ostensibly in the exercise of the police power, but which unnecessarily interferes with the personal liberty of the citizen, the courts may examine the act and determine whether it relates to the objects which the exercise of the police power is designed to, and does, secure: White's App., supra; Chenowith v. State Board, 57 Colo. 74; Dobbins v. Los Angeles, 195 U. S. 233.

> "The matter or mode of exercising a lawful occupation may be regulated only in the interest of public health or to secure safety to the citizens. The legislature cannot adopt, as regulations, the ethics of the profession which may limit the practice to be secured or the method of procuring it."

In the case of Berry v. State, 135 S. W. 631 (Tex.), the statute authorized revocation of a license for grossly unprofessional or dishonorable conduct of a character likely to deceive or defraud the public. The Texas court calls particular attention to the distinction between acts which are detrimental to the public welfare and acts which violate the ethical canons of the profession and held that the violation of the ethical canons of the profession cannot be dealt with by legislation. The court says:

> "The terms 'unprofessional' or 'dishonorable' conduct, used in the law of 1907, are qualified and modified by the language 'of a character likely to deceive or defraud the public,' to distinguish them from acts that are unprofessional or dishonorable under the code of ethics prescribed by the honorable profession of medicine that would not, directly, at least, react to the disadvantage of the public, such as not adver-

tising, of not entering into a consultatoin with an attending physician without his consent, and other acts that go to form and constitute the code of the honorable and upright practitioner of medicine. The law leaves the enforcement to the medical profession of its rules of ethics, and, however conducive they may be to creating and preserving the high standard of one of the most important and honored professions in the world, takes no cognizance of them, and does not seek to enforce them, except in so far as their infraction may infringe upon the rights and welfare of the public. But when the unprofessional conduct of the member of the medical profession is of such a character as to deceive or defraud the public, then the law denounces such conduct, and strips the offender of the means which make it possible to impose upon the credulous and unwary. Such unprofessional conduct would necessarily be closely allied to crime, because it is defrauding the public, and yet it was never intended to confine such conduct to the kind or class of offense that is denounced by the Criminal Code of Texas. That is provided for in a different subdivision of the statute from the one under which this case is prosecuted."

In Sapero v. State Board of Medical Examiners, 90 Colo 568-580, in a concurring opinion by Judge Butler, we have the following language:

"I concur in the decision, but wish to add to the reasons assigned for a reversal of the judgment one that seems to me to be too important to be overlooked.

"The right to revoke the license of a physician exists only by virtue of legislation enacted under the police power. To be valid, such legislation must bear a fair relation to the public health, safety, morals, or welfare, and tend to promote or protect the same. The Legislature has no power, under the guise of police

regulation, to arbitrarily invade the personal rights of an individual. It cannot provide for the revocation of a physician's license for a mere breach of ethics not involving moral turpitude or dishonorable conduct. The advertisements published by Sapero were entirely harmless, and could not injuriously affect the public health, safety, morals, or welfare. Their publication therefore did not justify the revocation of his license. While such publication may be considered unethical by some, or even many, physicians, and may even constitute ground for exclusion from a medical society, it no more justifies the revocation of a physician's license to practice than would a mere breach of etiquette, or the exhibition of table manners that do not conform to the usage of polite society.

"Such advertising does not come within the probition of the statute. If the statute attempted—and it does not—to make it a ground for the revocation of a physician's license, it would be unconstitutional and void. It is needless to cite more than one of the cases that support this proposition. Chenoweth v. State Board of Medical Examiners, 57 Colo. 74, 141 P. 132, 51 L. R. A. (N. S.) 958, Ann. Cas. 1915-D, 1188. The revocation of Sapero's license was an abuse of the board's discretion."

In Hewitt v. State Board of Medical Examiners, 148 Cal. 590-593, we have involved the validity of a statute which authorized revocation and forbid advertising of medical business in which grossly improbable statements were made. The court held the statute invalid and said:

"Under this provision the penalty of forfeiture of a physician's license is not made to depend upon falsity in fact of any matter contained in a statement, or knowledge on the part of the physician that it is false, or for the reason that it was intended or had a ten-

dency to deceive the public or to impose upon credulous or ignorant persons, and so be harmful and injurious to public morals, health and safety. It is a matter of no moment under the provision of the act, and is entirely immaterial, whether the statement is true or false, beneficial or injurious. * * * The advertisement in connection with his medical business may be made in entirely good faith; the statement may be of such a character that it involves no moral delinquency on the part of the physician, nor in any degree tends to deceive or injure the public. These matters, however, have no controlling effect. If in the judgment of the board, such statements are 'grossly improbable' the right to practice is forfeited. Instead of furnishing some standard by which the physician can determine in advance what statements shall be treated as 'grossly improbable,' some definition of that term which will be a protection to him in his legal right to advertise his business, the statute, as far as his action is concerned, leaves that matter at large, but provides that after he had made the advertisement an ex post facto judgment of the board shall determine whether his statement is 'grossly improbable' or not."

While the Washington Supreme Court held in the case of Laughney v. Maybury case that the prohibition of all advertising by osteopaths was a proper enactment, yet the Washington Supreme Court had this matter under consideration at other times a somewhat similar situation and rather recognized that in order for an enactment to be invalid there must be some element of fraud and deceit in the advertisement. The case of State Board of Medical Examiners v. Macy, 92 Wash. 614-617, the court had under consideration a statute as follows:

"Third—All advertising of medical business which is intended or has a tendency to deceive the public or

impose upon credulous or ignorant persons, and so be harmful or injurious to public morals or safety."

The court sustained this statute

"in view of the element of deceit in our statutory definition of unprofessional conduct."

The court distinguished that case from the Hewitt case (Calif.) because

"The element of tendency to deceive or intent to deceive found in the above quoted definition of our statute was apparently not present in the California statute, and this it might well be argued distinguishes that case from the one before us."

This is a recognition by the Washington court that the only advertising that can be lawfully condemned is such that is fraudulent or has a tendency to deceive and when such elements are incorporated into the statute.

The California statute was later amended to read as follows:

"All advertising of medical business which is intended or has a tendency to deceive the public or impose upon credulous or ignorant persons, and so be harmful or injurious to public morals or safety."

This statute was, in the case of Glass v. State Board of Medical Examiners, 50 Cal. App. 389-392, held valid because, as the court says:

"The legislation was evidently framed with the direct purpose and intention of stating a rule in conformity with the principles declared in the Hewitt case. Under these provisions a certificate could not be re-

voked unless it was first determined by the Board that the advertising complained of was in fact false and was intended or had a tendency to deceive the public or impose upon credulous or ignorant persons. * * *"

It would appear from this reasoning that the California Court would not sustain a statute which prohibited truthful and honest advertising.

In Aiton v. Board of Medical Examiners, 13 Ariz. 354-360, the Arizona Court sustained a statute regarding advertising, but took particular pains to point out the limits in such matters by using the following language:

"The Board of Health has no right to prescribe a code of medical ethics, and then declare a breach of that code unprofessional and dishonorable conduct; nor has it the right or power to deny to physicians the right to advertise their profession in the public press. The respondents (board) make no claim of any right to do either of these things. Their claim is that advertisements which tend to mislead and deceive the public constitute unprofessional and dishonorable conduct, and in this way they are within the purview of the law."

Again in the case of Ex Parte McNulty, 77 Cal. 164-168, 19 Pac. 237, Justice Thornton, in a concurring opinion, used the following language:

"I concur in the conclusion reached by Justice McFarland, and am inclined to concur in the reasons given by him for such conclusion. But I cannot hold that the legislature has the constitutional power to enact a law punishing a physician who has been decided to be competent to practice, as was the case with the petitioner here, when a certificate was issued to him,

for what is styled 'unprofessional conduct', and as advertising himself in a newspaper and in a printed pamphlet as a specialist in certain enumerated diseases. This goes beyond the police power, under which power the statute to be considered was enacted. That a rule of professional conduct by a board of medical men prohibiting such advertisements, and declaring them unprofessional, can be declared a misdemeanor, and punished, would extend the police power beyond whatever has been allowed. As well might the board declare that wearing any other hat than one of a white color, by a physician, should be unprofessional conduct, and cause it to be punished as a misdemeanor. The advertisement of the character mentioned does no harm to anyone. It may be of benefit to the public, by giving to the subjects of the diseases mentioned information of the existence and residence of a person who has peculiar skill in curing them. Such laws are passed to prevent injury to the community, not to prevent or exclude a benefit to it. We are told that at one time the able and celebrated Hannemann, a competent and properly licensed physician, was prosecuted and persecuted in a German state for compounding his own medicines, under a law enacted in the interest of apothecaries. I cannot conclude that such a statute here could be regarded as a valid exercise of power under our constitution. Professional etiquette prescribed by a class of men so eminent in standing as the medical practitioners of our state is a matter to be regarded and respected, but it has its limits, and I cannot conceive that a violation of it by a competent physician can ever be by the state made a penal offense. The rules in regard to such etiquette between the members of the medical, as between those of the legal, profession, must find their enforcement from a source other than the state. It is highly proper and just that it should be so. As the state cannot make the conduct of petitioner penal directly, it cannot do so indirectly. To hold as contended here by counsel adverse to the claims of petitioner would be to affirm the validity of a statute in which an attempt is seem-

ingly made to accomplish that indirectly which cannot be directly done. For the reasons given above, the petitioner, in my judgment, should be discharged from custody."

In the case of State Board of Medical Examiners v. Jordan, 92 Wash. 234-239, the Supreme Court of Washington said on this subject:

"Under our statute the defendant is not tried on the advertisement alone, but on the advertisement and his capacity, qualifications, or actions to fulfill it. The appeal to the Superior Court secures a trial de novo. In such trial a proper line of proof is not only the advertisement but the competence of the defendant to do what he advertises he can do. The issue then becomes like that in getting money by false pretenses which no Legislature has ever been required to define. The crime is determined not from the representations alone, but from all the actions and circumstances in which intent can be gathered.

"Our law has not prevented a practitioner from advertising cures or inviting the public to his healing, but only advertisements intended to beguile. It attacks not mere unethical conduct, but wrongful conduct. If from the testimony it appears that he either does not cure the diseases, never has cured them, cannot cure them, or does not know what they are, the law has then a right to say it is advertising to deceive. This fully explains why the California court, dissatisfied with 'grossly improbable statement', which would have made a mere academical or legal debate, was satisfied to suggest the present form for a different issue."

In the case of Yoshizawa v. Hewitt, 52 Fed. (2d) 411 the Ninth Circuit Court of Appeals said:

"Furthermore, it may be pointed out that there is a vast difference between unprofessional and dishon-

orable conduct, a phrase sometimes found in statutes of this nature, and the term gross and manifest incapacity. The former relates to 'professional ethics' and the personal conduct of the physician, while the latter relates to the physician's method of treatment and the degree of care exercised in the treatment of patients and the physician's skill and capacity properly to diagnose and treat such patients—terms that seem to have a well-defined meaning both in the law and in the medical profession."

Thus we submit that the enactment of this legislation is not in the interest of the public welfare but is an enactment of what is commonly denominated the ethics of the profession. It is a far stretch of the imagination to say that honest and truthful advertising either in a profession or in a business has a tendency to impair the general welfare. It is in the interests of the public to know more about the professions and it cannot be said or argued that the dissemination of knowledge and truth is injurious to the general welfare. It is said that the tendency of advertising is to commercialize the professions and the layman informs us that there is a tendency to commercialize the professions at the expense of the layman. It is much better for the profession and for the general public that the facts pertaining to the professions shall become known to the layman. The sentiment among some of the professions to take the public into their confidence and familiarize the public with the concepts of the professions certainly can bring no harm to the general welfare.

ARGUMENT IN SUPPORT OF JURISDICTION

The appellant in support of the jurisdiction of this Court to review the above entitled cause on appeal, respectfully shows that:

First.

The Supreme Court of the United States has jurisdiction in the appeal of this cause by virtue of a statute of the United States, namely, Section 237 of the Judicial Code, as amended and now published in U. S. Code, Title 28, Section 344.

Second.

This is an appeal from a final judgment of the Supreme Court of the State of Oregon, the highest court of the State of Oregon, and which judgment became final on the 11th day of September, 1934, on which date said court denied appellant's petition for rehearing.

Third.

The judgment appealed from upholds the constitutionality of a statute of the State of Oregon, the validity of which was drawn in question and challenged on the ground that it violates Section 1 of the XIVth Amendment of the Constitution of the United States. The cause originated on plaintiff-appellant's complaint, by which complaint appellant, a licensed, practicing dentist of Portland, Oregon, sought to enjoin a threatened enforcement of said statute, namely, Section 68-1013, Oregon Code Laws, 1930, as

amended by act of Oregon Legislature on March 1, 1933, said amendment being Section 2 of Chapter 166, Oregon Session Laws, 1933, page 208, which statute provides in part that any dentist may have his license revoked or suspended by the Board of Dental Examiners for unprofessional conduct, and states that unprofessional conduct shall mean, among other things, the following:

> "Advertising professional superiority or the performance of professional services in a superior manner; advertising prices for professional service; advertising by means of large display, glaring light signs, or containing as a part thereof the representation of a tooth, teeth, bridgework or any portion of the human head; employing or making use of advertising solicitors or free publicity press agents; or advertising any free dental work, or free examination; or advertising to guarantee any dental service, or to perform any dental operation painlessly."

Said statute further provides that "The proceedings under this section may be taken by the board from the matters within its knowledge, or may be taken upon the information of another; provides, however, that if the informant is a member of the board, the other members of said board shall constitute the board for the purpose of finding judgment of the accused." The statute does provide for an appeal to the State courts from a decision of the Board of Dental Examiners, but as a condition to the right to appeal, it requires the accused first to furnish security for costs. Thus the statute permits the board to be both the accuser in a certain measure, and also allows the remaining members of the board to hear the charges.

Fourth.

The appellant here, plaintiff below, filed his complaint, a suit in equity, in the Circuit Court of the State of Oregon for Multnomah County, and therein alleged in substance that he has been a duly licensed dentist of the State of Oregon continually since the year 1918, and as such, since that time, has been engaged in practicing dentistry in the City of Portland, Oregon; that from the beginning of his practice he has used advertising methods now forbidden by the above quoted portion of said statute; that his advertising has always been made truthfully and honestly; that he has contracted in advance for such advertising with several firms and newspapers, which contracts ve a long period of time to run, and that he has obligated lf on other contracts with dental assistants and large e space; that a threatened enforcement of said statute would deprive him of his property without due process of law, in violation of Section 1 of Amendment XIV of the Constitution of the United States, together with allegations that said statute violates the organic State law of Oregon. The defendants below, respondents herein, filed a demurrer to said complaint, which demurrer was sustained by said lower court on the 19th day of October, 1933, on the express ground, among others, that said statute does not violate the Constitution of the United States. Whereupon appellant perfected an appeal from said lower court's ruling to the Supreme Court of the State of Oregon, which court on appeal also held said statute to be valid and not in violation of the United States Constitu-

tion. Accordingly the Supreme Court of the State of Oregon entered its judgment upholding said statute on June 26, 1934, whereupon appellant thereafter, and within time allowed by law and by the rules of the Supreme Court of the State of Oregon, duly filed in said Supreme Court his petition for rehearing, and said petition for rehearing was considered by the said Supreme Court of the State of Oregon and was by said court denied on the 11th day of September, 1934, and its said judgment is final.

Fifth.

The question as to the validity of the statute under consideration is of public importance. During the past two years several States have enacted similar statutes in an unique attempt to try to enact into statutory law the ethics of the American Dental Association, under the guise of police powers, and thereunder to empower a small group of politically appointed men on a dental board, on their own initiative, to revoke a fellow dentist's license for advertising his work or prices, even though he advertises them honestly. Such a statute attempts to do indirectly what could not be done directly. Quite obviously such a law is not for the benefit or welfare of the general public but is designed for the financial benefit of a portion of the dental profession and at the expense of the public. This is shown by the fact that there have been statutes in the past, and there are now statutes in a good many States making it unlawful for a dentist to use deceptive or fraudulent advertising. Oregon has had such a law since 1913

and appellant is heartily in accord, but it has only been in the immediate past that the State of Oregon, along with a few other States, has enacted a law making it unlawful for a dentist to advertise, even though the advertising is truthful and not fraudulent or deceptive.

There is a conflict in the decisions of the State courts as to the constitutionality of such a statute. The State courts of Ohio, Texas, Colorado and Illinois have declared statutes of like import to be unconstitutional:

Ohio: *Ex parte Craycroft*, 24 Ohio N. P. (N. S.) 513.

Texas: *Waller* v. *State*, 68 S. W. (2d) 601. Decided Jan. 29, 1934.

Colorado: *Chenoweth* v. *State Board of Medical Examiners*, 57 Colo. 74.

Illinois: *Kalman* v. *Walsh*, 353 Ill. 341-347.

Schireson v. *Walsh*, 354 Ill. 40.

whereas it has been held by the State of Washington that a statute of similar import is constitutional:

Laughney v. *Maybury*, 145 Wash. 146.

The question involved has not been considered or passed upon by the Supreme Court of the United States, and, in view of the conflict of State decisions, final ruling by this Court is highly desirable. The validity or invalidity of the statute in question is one of concern not only in the State of Oregon but in sister States where legislation of a like nature has of late been and is now being enacted.

In addition to the above, we believe the following cases support and sustain the jurisdiction of the United States Supreme Court in this case.

Bryant v. *Zimmerman*, 278 U. S. 63.
Blodgett v. *Silberman*, 277 U. S. 1.
Miller v. *Schoene*, 276 U. S. 272.
John P. King Mfg. Co. v. *City Council of Augusta*, 277 U. S. 100.
Bandini Petroleum Co. v. *Superior Court of Cal.*, 284 U. S. 8.

The Supreme Court of Idaho, in the case of Abrams v. Jones, 35 Idaho, 532, had under consideration a statute wherein the dental examining committee ordered the hearing and recommended to the Commissioner the revocation of the dentist's license. The charges were formulated by the dental examining committee occupying the dual role of accuser and trier. The Supreme Court of Idaho, page 545, says:

> "Here we have the anomalous situation of a committee of ethical dentists, who are empowered to investigate the affairs of other members of their profession, upon written complaint of any licensed dentist, to make such expenditures of public moneys as may be necessary to that end, to prefer charges against dentists whom they regard as guilty of violations of the dental law, and then under the semblance of a hearing to sit in judgment upon and to condemn the accused. This dual role of the dental examining committee as both prosecutor and judge is repugnant to the spirit of American law, a fundamental principle of which is that no man shall be deprived of life, liberty or property without due process of law, and as was said in In re Cameron, 126 Tenn. 614, 151 S. W. 64,

at 76: 'Beyond question it is not according to due course of law to compel a man over his protest to try his case before a judge who has already decided it, and has announced that decision in advance of the hearing. It is equally true that such compulsion is a denial of justice.'

Due process of law is not necessarily satisfied by any process which the legislature may by law provide, but by such process only as safeguards and protects the fundamental, constitutional rights of the citizen. Where the state confers a license upon an individual to practice a profession, trade or occupation, such license becomes a valuable personal right which cannot be denied or abridged in any manner except after due notice and a fair and impartial hearing before an unbiased tribunal.

We are bound to assume that in preferring the charges against respondent the dental examining committee had reasonable ground to believe that the charges were true, or in other words, that they had received evidence which appeared to justify the revocation of respondent's license under the dental law. It would then be manifestly unfair to require respondent to submit himself to a hearing before the committee, which had at least tentatively prejudged the matter as evidenced by the charges which it had brought against respondent. The committee was clearly disqualified, both in law and in fact, to give respondent a fair and impartial hearing, and this is the only hearing known to the law. It is of the highest importance that the actions, not only of the court but also of all other governmental agencies, should be free from reproach or the suspicion of unfairness. We attribute only the highest motives to the commissioner and the members of the committee. Nevertheless the fact remains that respondent was entitled to a hearing before an impartial body, and this right was denied when he was required to submit himself before a body which was at once his accuser, prosecutor and judge.

In Broom's Legal Maxims, 8th ed., pp. 94-99, it is said: 'It is a fundamental rule in the administration of justice that a person cannot be judge in a case where he is interested * * * * And therefore in the reign of James I it was solemnly adjudged that the king cannot take any cause, whether civil or criminal, out of any of his courts and give judgment on it himself * * * * And it is a maxim of law that no man can be at once judge and suitor.'

See, also, State Board of Health v. Ray, 22 R. I. 538, 48 Atl. 802; State v. Clancy, 30 Mont. 529, 77 Pac. 312; Lindsay-Strathmore Irr. Dist. v. Superior Court, 182 Cal. 315, 187 Pac. 1056; Coke on Littleton, sec. 212.

In the case of Meyer v. City of San Diego, 121 Cal. 102, 66 Am. St. 22, 53 Pac. 434, 41 L. R. A. 762, the following language was used by the court: 'it is a principle which finds expression in the constitution of many of our states, which declare the right of a citizen to be tried by judges as free and impartial as the lot of humanity will permit. It is a principle whose strict observance is dictated both by natural justice and an enlightened public policy; for it is not enough that a judicial decision be sound. It is of next importance that the tribunal rendering it be free from the charge of interest or the taint of partiality, else public confidence will be destroyed and judicial usefulness gravely impaired'."

The tendency of this legislation is to take away from the citizens that freedom of action guaranteed to them by the fundamental law.

Respectfully submitted,

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